No. 17,387

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,* vs. CHARLES E. and LOIS ROSEBROOK, *Appellees.*	

On Appeal from the Judgment of the United States District Court for the Northern District of California

BRIEF FOR THE APPELLANT AND APPENDICES

LOUIS F. OBERDORFER,
Assistant Attorney General.

LEE A. JACKSON,

ROBERT N. ANDERSON,

HAROLD M. SEIDEL,
Attorneys, Department of Justice,
Washington 25, D. C.

CECIL F. POOLE,
United States Attorney.

RICHARD L. CARICO,
Assistant United States Attorney.

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OPINION BELOW

The opinion of the District Court (R. 11-18) is reported at 191 F. Supp. 356.

JURISDICTION

This appeal involves federal income taxes. The taxes in dispute were paid on September 28, 1959. (R. 19.) Claim for refund was filed on September 29, 1959, and was rejected December 17, 1959. (R. 5, 7.) Within the time provided in Section 6532 of

the Internal Revenue Code of 1954 and on December 18, 1959, the taxpayers brought an action in the District Court for recovery of the taxes paid. (R. 3-6.) Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1346. The judgment was entered on January 3, 1961. (R. 26-27.) Within sixty days and on March 2, 1961, notice of appeal was filed by the United States. (R. 27.) Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

QUESTION PRESENTED

Whether the District Court erred in holding that the taxpayer as a member of a joint venture received capital gain and not ordinary income on the sale of 884 acres of realty by the venture.

STATUTES INVOLVED

The statutes involved are set forth in Appendix A, *infra*.

STATEMENT

The facts as found and stated by the District Court in its opinion (R. 11-14) are as follows:

For some time prior to 1953, George W. Williams, Lois Rosebrook's[1] father, had been attempting to pur-

[1] Lois Rosebrook will hereinafter be referred to as the taxpayer since her husband, Charles E. Rosebrook, is a party to this action only because a joint return was filed. (R. 11.)

chase approximately 1,159.6 acres of San Francisco peninsula land owned by the San Bruno Lands, Inc. (R. 11-12.)

He was not able to obtain sufficient financing to make the purchase until 1953 when he interested a group, including himself, Frank Burrows, Andrew Conway, Martin Wunderlich and Thomas Culligan—all of whom were prominent in the real estate subdivision business. (R. 12.)

On April 23, 1953, these parties entered into an agreement (Deft. Ex. A) that they would purchase the stock of San Bruno Lands, Inc., for a total of $1,150,000, in order to acquire the 1,159.6 acres of land and that after acquisition they would dissolve the corporation and take the land as tenants in common in proportion to their respective contributions.[2] (R. 12.)

On the same day they entered into another, separate memorandum (Deft. Ex. B, Appendix C, *infra*) to the effect that the respective tenants in common would hold the land for six months in order to realize a capital gain and then sell it to a development corporation to be formed by the parties for the purpose of developing and subdividing the land, the stock in any such corporation to be issued—one third to Williams

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[2]It was agreed that Williams and Burrows should contribute ⅓, Wunderlich ½, and Conway and Culligan ⅙ of the purchase price; only 10% of that amount was to be contributed upon execution of the agreement. The agreement provided that their interests in the property were to correspond with the above contributions. (Deft. Ex. A.)

and Burrows, one third to Conway & Culligan and one third to Wunderlich. (Deft. Ex. B; R. 12.)

It was understood, i.e., the memorandum stated, that these respective parties were acting, not only for themselves, but for other interests represented by them. (R. 12.)

Accordingly, on May 7, 1953, the group purchased the capital stock of the San Bruno Lands, Inc. The corporation was immediately liquidated and the land was taken in the name of the group who then quitclaimed it to all contributing interests as tenants in common according to their respective contributions to the purchase price and took back a power of attorney for purposes of management. (R. 12-13.)

Among the contributing interests represented in these transactions by George W. Williams was a certain irrevocable trust which he and his wife had created in 1942 for their daughter, the taxpayer. Her father, George W. Williams, was sole trustee. In 1953 there was cash on hand in the trust in the amount of $10,000. Williams, acting as trustee, contributed $7,000 on behalf of the trust as part of the contribution of his group to the acquisition of the San Bruno land. In due course, the trust received a conveyance of a 1% interest therein as tenant in common. (R. 13.)

On October 28, 1953, Williams, Burrows, Conway, Culligan and Wunderlich, and an outside party, organized Consolidated Land Company for the purpose of subdividing and developing the San Bruno land. (R. 13.)

On December 18, 1953, when taxpayer was 28 years of age, the trust was dissolved and all the trust assets, including the 1% interest in the San Bruno land, were transferred by her father, as trustee, into her name. (R. 13.)

On February 10, 1954, the tenants in common of the 1,159.6 acres, sold and conveyed 884.2 acres of the parcel to Consolidated Land Company for a total purchase price of $1,768,500, payable in $100,000 cash and an installment note of the corporation for the balance. (R. 13.)

Taxpayer, concurring in the suggestion of her father, conveyed her 1% interest to the corporation and received the sum of $1,000 in cash and a 1% interest in the installment note for the balance. (R. 13.)

The Commissioner ruled that the gain on this sale was not a capital gain to the taxpayer, but ordinary business income to her. The trial court disagreed and awarded judgment for the taxpayer. (R. 11-18.) In so doing it stated that assuming and finding that George W. Williams, the taxpayer's father, trustee and agent, and others in the joint venture held their interests in the land in question primarily for sale to customers in the ordinary course of their business, it does not necessarily follow that the taxpayer held her 1% interest with the same intent and purpose. (R. 14.)

STATEMENT OF POINTS TO BE URGED

1. The District Court erred in holding that the taxpayer as a member of the joint venture did not hold her interest in the land in question primarily for sale to customers in the ordinary course of a trade or business.

2. The District Court erred in holding that the taxpayer properly reported the gain realized upon the sale of her interest in the 884.2 acres of land as capital gain.

3. The District Court erred in failing to hold that the taxpayer as a member of the joint venture received ordinary income rather than capital gain on the sale of her interest in the 884.2 acres of realty by the venture.

SUMMARY OF ARGUMENT

The District Court found that the taxpayer participated in a joint venture to acquire certain real property, hold it for at least six months, and then sell it to a corporation to be formed by the principal, active, members of the venture to develop, and subdivide the realty. The court also held that in a joint venture, unlike a partnership, each of the participants may hold his interest in the realty for a different purpose. It concluded that the principal members of the venture, who were prominent in the real estate subdivision business, held their interests in the real property primarily for sale to customers in the ordinary course of the business—that the joint venture was merely a step in carrying on the business enterprise—because

they were going to, and did, subdivide the property through the medium of the corporation (Consolidated Lands) which they formed for that purpose. However, because neither the taxpayer nor her predecessor in the joint venture, a trust for her benefit, had any interest in Consolidated, the District Court held that her purpose in holding her interest in the realty was different from that of her fellow venturers and that she was not holding her interest primarily for sale to customers.

In our view, the District Court erred in holding that each member of a joint venture may hold his interest in the realty for a different purpose. Under the Internal Revenue Code, the question of whether a member of a joint venture receives capital gain or ordinary income on a sale of an asset by the venture turns on whether the asset was a capital asset in the hands of the venture, or, whether the venture held the asset primarily for sale to customers in the ordinary course of its business. In a joint venture, there is a community of interest in the enterprise; therefore there must be a common purpose in holding the property. The common purpose of the joint venture at bar was to sell the land for subdivision through the medium of a corporation controlled by the principal venturers, and, looking at the entire transaction as a whole, it is evident that the acquisition and sale of the land by the venture were merely steps in the subdivision of the 884 acres sold to Consolidated.

In a joint venture, all the members have a common purpose, and since the purpose of the principal, active,

and dominant members of the venture was the acquisition of the property as a step in its subdivision, it follows that the represented and inactive members accepted this purpose by participating in the venture. Moreover, since each member of a joint venture is an agent of the others in transacting the venture's business, the active, principal and controlling members, in acquiring the land through the venture as a step in their business enterprise, were acting for and on behalf of the passive and represented members, and determined the venture's purpose for all the members.

The District Court's opinion states that if the participants in the transaction had acted through a "true business partnership" rather than a joint venture, then it would have imputed to the passive and represented members the purpose of the principal, active and controlling members. Since there is little difference between a partnership and a joint venture, and since a joint venture is considered a partnership for tax purposes, the court below erred in applying different standards for these organizations. This conclusion is supported by the fact that the results of the transaction were the same whether the organization was a partnership or a joint venture.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT THE TAXPAYER AS A MEMBER OF THE JOINT VENTURE RECEIVED CAPITAL GAIN INCOME ON THE SALE OF THE REAL PROPERTY BY THE VENTURE

A. Introduction

A trust for the benefit of the taxpayer, of which the taxpayer's father and mother were grantors and her father was the trustee, acquired as a member of a joint venture a 1% interest in 1,159.6 acres of land on the San Francisco peninsula near San Bruno, California. The land was acquired pursuant to an agreement between taxpayer's father and others prominent in the real estate business that a corporation owning the land (San Bruno Lands, Inc.) would be acquired and liquidated and that the land would then be held by those participating in the venture as tenants-in-common. A memorandum executed at the same time as the above agreement provided that the land was to be sold more than six months after it was acquired to a corporation organized and owned by the principals involved, i.e., taxpayer's father and the others prominent in the real estate business, for an average price of $2,000 per acre and that that corporation would subdivide and develop the land by construction of homes and business areas. (R. 12-13.)

The land was acquired by the trust and the other tenants-in-common when San Bruno Lands, Inc., was dissolved on May 7, 1953. On December 18, 1953, the trust for taxpayer's benefit was dissolved, and on February 10, 1954, the taxpayer, who had taken her interest in her own name, and the other tenants-in-

common conveyed their interests in part of the land (884.2 acres) for $2,000 per acre to a corporation (Consolidated Lands) organized by taxpayer's father and the other principals involved in the venture. On the conveyance, the taxpayer received $1,000 cash and an installment note for the balance. Neither the taxpayer nor her trust had any interest in Consolidated. (R. 12-13.)

Section 1221 of the Internal Revenue Code of 1954 (Appendix A, *infra*) defines the term "capital asset" to mean property held by a taxpayer but excepts from that term, *inter alia,* property held by a taxpayer primarily for sale to customers in the ordinary course of his trade or business.

The principal issues below, as the District Court's opinion states (R. 14), were whether the taxpayer—

> held her 1% interest for the same purpose and with the same intent as all others participating in the venture, and, further that even if such was not her intent and purpose, [whether] the intent and purpose of her father, and others in the venture would be imputed to her as a matter of law by reason of her participation in it.

The court found (R. 12) that the principal participants in the acquisition of the San Bruno land (George Williams, the taxpayer's father, Frank Burrows, Andrew Conway, Martin Wunderlich, and Thomas Culligan) were all prominent in the real estate subdivision business, and that they planned to acquire the San Bruno land, hold it for six months in order to realize capital gains, and then sell it to a development cor-

poration to be formed by them for the purpose of subdividing and developing the land.[3] The court concluded (R. 14) that George Williams, the taxpayer's "father, trustee and agent, and others in the joint venture held their interests in this land primarily for sale to customers in the ordinary course of their business" because (R. 15) from the start they intended to and did develop and sell the land through and by means of Consolidated Lands, the development corporation which they formed.[4]

Thus, if the taxpayer held her interest with the same intent as the other participants or if their intent is imputed to her by reason of her participation in the venture, then the taxpayer would also be considered as holding her interest primarily for sale to customers. In either of these events, her interest would not be a capital asset under Section 1221 and the income from the sale would not be subject to the

---

[3]It should be noted that this finding was made, as the opinion states (R. 12), on the basis of the memorandum executed by these parties on April 23, 1953 (Deft. Ex. B, Appendix C, *infra*), the same day that they agreed in another writing to buy the stock of San Bruno Lands, Inc., in order to obtain the land held by that corporation. In so finding, the court rejected the other interpretations placed on that memorandum by Mr. Williams and Mr. Burrows. (R. 102-107, 125-127.) The rejection of their explanations was wholly within the trial court's discretion, particularly in light of the fact that this litigation may affect their personal tax liabilities with respect to the same transaction and they were accordingly parties in interest. (R. 71-72.)

[4]Even if these principal parties were not otherwise engaged in the real estate subdivision business, the scheme of purchasing 1,159 acres and holding 884 acres for sale to a corporation controlled by them for subdivision and resale (R. 12) is sufficient to constitute a trade or business with respect to the 884 acres. *Burgher v. Campbell*, 244 F. 2d 863 (C.A. 5th); *Pool v. Commissioner*, 251 F. 2d 233, 248 (C.A. 9th); *Rollingwood Corp. v. Commissioner*, 190 F. 2d 263, 266 (C.A. 9th).

special treatment accorded capital gain by Sections 1201 and 1202 of the Code. (Appendix A, *infra.*)

With respect to the first of the principal issues, whether the taxpayer held her 1% interest with the same purpose and with the same intent as all others participating in the venture, the court found (R. 14-15) that she did not because neither she nor her trust had any interest in Consolidated. The court also found that the trust for the benefit of the taxpayer was not engaged in the real estate business nor was the taxpayer herself so engaged. (R. 16.)

The court thus attempted to eliminate on the basis of its findings two possible grounds for holding her interest was not a capital asset: she was not in the real estate business apart from this transaction, and her interest in this transaction, limited to the purchase and the subsequent sale to Consolidated without any interest in Consolidated, did not require that she be considered as holding her interest for sale to customers in the ordinary course of business.

With respect to the other principal issue, whether the intent and purpose of her father and others in the venture would be imputed to her because of her participation in that venture, the court in the following quoted paragraphs of its opinion found that the taxpayer participated in a joint venture in the San Bruno land, but held that the taxpayer's purpose in so participating was different from that of the other members of the venture (R. 14, 17):

> Assuming, and finding for the purpose of this case, that George W. Williams, plaintiff's father,

> trustee and agent, and others in the joint venture held their interests in this land primarily for sale to customers in the ordinary course of their business, it does not necessarily follow that this plaintiff held her 1% interest with the same intent and purpose.
>
> * * *
>
> The intent and purpose of participants in a joint venture, which contemplated a sale of their respective realty interests to an ultimate purchaser, as in this case the development company, might be quite different one from another. For some it may be just a step in carrying on their business; for others it may be merely a single opportune investment with a view of ultimate profit but unrelated to any business of the participant, as in the case of plaintiff here. In the absence of a true business partnership for the purpose of the transaction, which the Court finds did not exist here, the intent and purposes of the former category are not imputed to the latter category, nor does the situation of the former for tax purposes necessarily determine the situation of the latter.

We accept the finding that there was a joint venture but we respectfully submit that the court erred as to the legal effect of the purposes and objectives of a joint venture on all the venturers.

B. The District Court erred in determining the legal effect of the purposes and objectives of a joint venture on the members of the venture

In the second paragraph quoted above from the opinion below, the District Court held that in the case of a joint venture the intent and purposes of

the principal venturers (for whom the venture is a means for carrying on a business) are not to be imputed to a single venturer (for whom the venture is allegedly an opportune investment unrelated to any business of the venturer). However, the court held that if the enterprise had been conducted through a "true business partnership" it would have imputed the purpose of the principal participants in the transaction to the others involved, such as the taxpayer at bar.

Before discussing what we submit is the court's error in determining the tax consequences to a member of a joint venture of the activity of such venture, it should be noted that the Internal Revenue Code of 1939 and the 1954 Code both provide that the term "partnership" when used therein includes, *inter alia,* a joint venture and that the term "partner" includes a member of a joint venture. See Section 3797(a)(2) of the 1939 Code and Section 7701(a)(2) of the 1954 Code (Appendix A, *infra*). The Code provisions relating to partnerships are thus applicable to joint ventures. *Haley v. Commissioner,* 203 F. 2d 851 (C.A. 5th); *Rupple v. Kuhl,* 177 F. 2d 823 (C.A. 7th); *First Mechanics Bank v. Commissioner,* 91 F. 2d 275 (C.A. 3d).

Sections 181 and 182 of the 1939 Code (Appendix A, *infra*) provide that a partnership is not a taxpayer but is a tax reporting entity and that the partners are required to pay tax on their distributive shares of the partnership's income whether or not received by them. Under 1939 Code Section 183 (Appendix A, *infra*),

the partnership's capital gains and losses are segregated from its ordinary income and thus are characterized in the partnership's hands. The partners report their distributive shares of the partnership's capital gain and of its ordinary income; the characterization of partnership income is thereby retained in the partners' distributive shares. *Neuberger v. Commissioner,* 311 U.S. 83; *Commissioner v. Paley,* 232 F. 2d 915 (C.A. 9th); *Commissioner v. Ammann,* 228 F. 2d 417 (C.A. 5th). Sections 701, 702(a)(1) and (2), (b), (c), and 703(a) of the 1954 Code (Appendix A, *infra*) contain the same provisions. Hence to determine whether a partner's distributive share of partnership income from the sale of an asset is capital gain or ordinary income, it is necessary to determine the nature of that income in the partnership's hands, which in turn depends on whether the property in question was a capital asset in the partnership's hands within the meaning of the statute, or held by it primarily for sale to customers in the ordinary course of its business. Since the term "partnership" by statute includes a joint venture, the same would be true with respect to a joint venture. Thus, in determining the nature of the land in the venture's hands here in question, it is immaterial that title was held in the members' names as tenants-in-common and not by the joint venture since the members were holding title on behalf of and in the course of the joint enterprise.

Turning to the question of whether the 884 acres were a capital asset under Section 1221 in the joint

venture's hands or whether the land was held by it primarily for sale to customers in the ordinary course of its business, let us briefly examine the nature of a joint venture. A joint venture is an undertaking by two or more persons jointly to carry out a single business enterprise for profit, and involves a community of interest in the enterprise and a sharing of profits and losses. It is akin to or has the earmarks of a limited partnership. *Engineering Serv. Corp. v. Longridge Inv. Co.,* 153 C. A. 2d 404, 410-415, 314 P. 2d 563, 566-570; *Bariffi v. Longridge Dev. Co.,* 156 C. A. 2d 538, 320 P. 2d 192. Accordingly, there must be a common purpose in holding the property. The joint nature or purpose of the undertaking under consideration is shown by the April 23rd memorandum which stated that after the San Bruno tract was acquired it was to be held for at least six months and that it was then to be sold to a corporation formed by the principal parties in the venture and that corporation was to develop and subdivide the property.

In considering this purpose, the Supreme Court's holding in *Commissioner v. Court Holding Co.,* 324 U. S. 331, 334, is particularly appropriate here:

> The incidence of taxation depends upon the substance of a transaction. The tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title. Rather, the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant. A sale by one person cannot be transformed for tax

> purposes into a sale by another by using the latter as a conduit through which to pass title. To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of tax policies of Congress.

The venture here acquired the property for sale to Consolidated and that objective was carried out. Thus, viewing the entire transaction as a whole, we submit that it cannot be gainsaid that the acquisition of the property by the venture was for the purpose of selling it to Consolidated for subdivision and resale and it was held for more than ten months with that objective in mind. The venture's acquisition and sale were integral steps in the transaction commencing with the acquisition of the land and terminating with its resale by Consolidated. Hence the venture, by its participation in the transaction, was indirectly engaging in the business of selling the property through Consolidated, and it must therefore be considered as holding the property for that purpose; it hardly can be considered as an independent venture acquiring the property solely for investment purposes through an appreciation in its value. (The property was not productive of sufficient income to cover the taxes and other expenses incident to its up-keep and maintenance.)

The above view is supported by the fact that in the common enterprise which is the subject of the joint venture there must be a controlling purpose. Since

the District Court found that the dominant and active members who were interested in Consolidated and who were prominent in the real estate subdivision business had the purpose in acquiring the property of reselling it to Consolidated as part of a single business enterprise, it therefore follows that the represented and inactive venturers, by participating in the venture, accepted this purpose and engaged in the business also. In other words the purpose of the principal or controlling members must certainly be imputed to the represented members. The District Court, however, held that the purpose of the principal members in a joint venture is not to be imputed to the represented members although it would have done so had there been a formal partnership here. We submit that the court erred in drawing this distinction between a joint venture and what it called a "true business partnership", for, as we have indicated, a venture is like a partnership in that both involve a common undertaking and a mutuality of interest in the joint enterprise. Indeed the resemblance between a joint venture and a partnership is so close that the rights and liabilities of joint venturers, as between themselves, are governed by the same principles which apply to a partnership. *Brooks v. Muth,* 144 C. A. 2d 560, 301 P. 2d 404. And since each member of a joint venture is an agent of the others in the transaction of the venture's business and the relationship of the members is that of mutual agency *(Engineering Serv. Corp. v. Longridge Inv. Co., supra),* the purpose of the principal and controlling members must also be that of the

members whom they represented in the venture's affairs (*Foote v. Posey*, 164 C. A. 2d 210, 330 P. 2d 651).

As we have noted the opinion below states that if there had been a "true business partnership" the court would have imputed to the passive, represented participants in the enterprise the purpose of the principals involved, and it found that that purpose was to use the venture as a step in the business of acquiring and subdividing the property through the medium of Consolidated. The court thus implicitly considered the venture's holding the land for more than six months prior to the conveyance to Consolidated as merely a step in the business of subdividing the land in which the represented and passive participants joined the principal participants. We wholly agree with the court's view that, by aging title to the property in an entity not directly involved in subdividing, the principals have not taken the property out of the business but that the represented parties have joined them in a phase or step of the business. However, we submit that in holding that this view of the transaction is applicable only in the case of a partnership and not in the case of joint venture the court erred for, as we have pointed out above, there is no basis for drawing such a distinction particularly in view of the fact that a joint venture is considered to be a partnership for tax purposes; and in point of fact the opinion below cites no authority for doing so.

Not only are the same rules applicable to both a joint venture and a partnership but the consequences of effecting the subdivision in steps by use of an in-

termediate entity which held title until the six-month's capital gains period had elapsed are the same regardless of whether the entity is a partnership or a joint venture. In either case the entity, controlled and dominated by the principals involved in the transaction, was employed, we submit, in an effort to siphon off at capital gains rates some of the profits to be realized by Consolidated on the subdivision for the benefit of these principals, their children, trusts for their children, and for their wholly-owned corporations. Because of the limited time which it was agreed that the joint venture, or for all practical purposes, the limited partnership would hold (and actually did hold) the property, and because of the fact that it was agreed that the property, after it had been held for that short time, would be conveyed to Consolidated for subdivision, at an agreed average price of $2,000 per acre, we believe that the joint venture or limited partnership held the property for sale to customers.

The Supreme Court said in *Corn Products Co. v. Commissioner,* 350 U.S. 46, 52—

> Congress intended that profits and losses arising from the everyday operation of a business be considered as ordinary income or loss rather than capital gain or loss. The preferential treatment provided by * * * [the capital asset provision] applies to transactions in property which are not the normal source of business income. It was intended "to relieve the taxpayer from . . . excessive tax burdens on gains resulting from a conversion of capital investments, and to remove the deterrent effect of those burdens on such conver-

> sions." *Burnet v. Harmel,* 287 U.S., at 106. Since this section is an exception from the normal tax requirements of the Internal Revenue Code, the definition of a capital asset must be narrowly applied and its exclusions interpreted broadly. This is necessary to effectuate the basic congressional purpose. This Court has always construed narrowly the term "capital assets" * * *.

The joint venture and the taxpayer at bar can hardly be said to be subject to excessive tax burdens on a prearranged sale to a related corporation at a fixed price and after a short, fixed holding period. In *Pool v. Commissioner,* 251 F. 2d 233, which also involved the question of whether land was held for sale to customers in the ordinary course of business, this Court applied those provisions narrowly, and stated (p. 249):

> The Supreme Court [in *Corn Products*] has warned us that the capital asset provision of our taxing statutes
>
> "must not be so broadly applied as to defeat rather than further the purpose of Congress."

We urge that the facts in the case at bar also warrant a narrow interpretation of the capital gains provisions.

In summary, the court below correctly viewed the substance of the entire transaction in determining what its tax incidence would have been had there been a partnership involved rather than a joint venture. However, the court erred in not considering a joint venture a partnership for tax purposes, and in not

recognizing that in a joint venture, as in a partnership, the members have a common purpose, and a mutuality of interest in the joint enterprise and that the same rules are applicable to both.

Since the court below erred with respect to a matter of law, we respectfully suggest that its judgment should be vacated and reversed.

CONCLUSION

For the reasons stated above, the judgment of the District Court is erroneous, should be reversed, and judgment should be entered for the United States.

Respectfully submitted,

Louis F. Oberdorfer,
Assistant Attorney General.
Lee A. Jackson,
Robert N. Anderson,
Harold M. Seidel,
Attorneys, Department of Justice,
Washington 25, D. C.

Cecil F. Poole,
United States Attorney.
Richard L. Carico,
Assistant United States Attorney.

September, 1961.

(Appendices A, B and C Follow)

Appendices.

Appendix A

Internal Revenue Code of 1939:

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

(26 U.S.C. 1952 ed., Sec. 181.)

SEC. 182 [as amended by Sec. 150(g), Revenue Act of 1942, c. 619, 56 Stat. 798]. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

(a) As part of his gains and losses from sales or exchanges of capital assets held for not more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for not more than 6 months.

(b) As part of his gains and losses from sales or exchanges of capital assets held for more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for more than 6 months.

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b).

(26 U.S.C. 1952 ed., Sec. 182.)

SEC. 183 [as amended by Sec. 150(g), Revenue Act of 1942, *supra;* and Sec. 9(c), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231]. COMPUTATION OF PARTNERSHIP INCOME.

(a) *General Rule.*—The net income of the partnership shall be computed in the same manner and on the same basis as in the case of an individual, except as provided in subsections (b), (c), and (d).

(b) *Segregation of Items.*—

(1) *Capital gains and losses.*—There shall be segregated the gains and losses from sales or exchanges of capital assets.

(2) *Ordinary net income or loss.*—After excluding all items of gain and loss from sales or exchanges of capital assets, there shall be computed—

(A) An ordinary net income which shall consist of the excess of the gross income over the deductions; or

(B) An ordinary net loss which shall consist of the excess of the deductions over the gross income.

* * * *

(26 U.S.C. 1952 ed., Sec. 183.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * *

(2) [as amended by Sec. 340(a), Revenue Act of 1951, c. 521, 65 Stat. 452] *Partnership and Partner.*—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization. A person shall be recognized as a partner for income tax purposes if he owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase of gift from any other person.

* * * *

(26 U.S.C. 1952 ed., Sec. 3797.)

Internal Revenue Code of 1954:

SEC. 701. PARTNERS, NOT PARTNERSHIP, SUBJECT TO TAX.

A partnership as such shall not be subject to the income tax imposed by this chapter. Persons carrying on business as partners shall be liable for income tax only in their separate or individual capacities.

(26 U.S.C. 1958 ed., Sec. 701.)

SEC. 702. INCOME AND CREDITS OF PARTNER.

(a) *General Rule.*—In determining his income tax, each partner shall take into account separately his distributive share of the partnership's—

(1) gains and losses from sales or exchanges of capital assets held for not more than 6 months,

(2) gains and losses from sales or exchanges of capital assets held for more than 6 months,

* * * *

(b) *Character of Items Constituting Distributive Share.*—The character of any item of income, gain, loss, deduction, or credit included in a partner's distributive share under paragraphs (1) through (8) of subsection (a) shall be determined as if such item were realized directly from the source from which realized by the partnership, or incurred in the same manner as incurred by the partnership.

(c) *Gross Income of a Partner.*—In any case where it is necessary to determine the gross income of a partner for purposes of this title, such amount shall include his distributive share of the gross income of the partnership.

(26 U.S.C. 1958 ed., Sec. 702.)

SEC. 703. PARTNERSHIP COMPUTATIONS.

(a) *Income and Deductions.*—The taxable income of a partnership shall be computed in the same manner as in the case of an individual except that—

(1) The items described in section 702(a) shall be separately stated, and

(2) The following deductions shall not be allowed to the partnership:

* * * *

(26 U. S. C. 1958 ed., Sec. 703.)

SEC. 1201. ALTERNATIVE TAX.

* * * *

(b) *Other Taxpayers.*—If for any taxable year the net long-term capital gain of any taxpayer (other than a corporation) exceeds the net short-term capital loss, then, in lieu of the tax imposed by sections 1 and 511, there is hereby imposed a tax (if such tax is less than the tax imposed by such sections) which shall consist of the sum of—

(1) A partial tax computed on the taxable income reduced by an amount equal to 50 percent of such excess, at the rate and in the manner as if this subsection had not been enacted, and

(2) an amount equal to 25 percent of the excess of the net long-term capital gain over the net short-term capital loss.

(26 U.S.C. 1958 ed., Sec. 1201.)

SEC. 1202. DEDUCTION FOR CAPITAL GAINS.

In the case of a taxpayer other than a corporation, if for any taxable year the net long-term capital gain exceeds the net short-term capital loss, 50 per cent of the amount of such excess shall be a deduction from gross income. In the case of an estate or trust, the deduction shall be computed by excluding the portion (if any), of the gains for the taxable year from sales or exchanges of capital assets, which, under sections 652 and 662 (relating to inclusions of amounts in gross income of beneficiaries of trusts), is includible by the income beneficiaries as gain derived from the sale or exchange of capital assets.

(26 U.S.C. 1958 ed., Sec. 1202.)

SEC. 1221. CAPITAL ASSET DEFINED.

For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(1) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

(2) property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 167, or real property used in his trade or business;

* * * *

(26 U.S.C. 1958 ed., Sec. 1221.)

SEC. 7701. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * *

(2) *Partnership and partner.*—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a

trust or estate or a corporation; and the term "partner" includes a member of such a syndicate-group, pool, joint venture, or organization.

* * * *

(26 U.S.C. 1958 ed., Sec. 7701.)

Appendix B

Table of Exhibits Pursuant to Rule 18(2)(f) as Amended:

Exhibit	Identified	Offered	Received
Pltf. Ex. 2	R. 37	R. 38	R. 38
Deft. Ex. A	R. 79	R. 80	R. 80
Deft. Ex. B	R. 81	R. 82	R. 83, 120
Deft. Ex. C	R. 84	R. 85	R. 85
Deft. Ex. D	R. 85	R. 85	R. 85
Deft. Ex. E		R. 86	R. 86
Deft. Ex. F		R. 91	R. 91
Deft. Ex. G	R. 101	R. 101	Rejected: R. 102 Admitted: For limited purpose, R. 116 Conditionally: R. 135-136

In the course of opposing counsel's opening statement to the court below, which is not included in the printed record, a Partial Stipulation of Facts and attached Exhibits were offered and admitted into evidence as Plaintiff's Exhibit 1. (Tr. 3.) The Exhibits are identified in the Partial Stipulation (R. 8-10) and are numbered as follows: Ex. 1-A, 2-B, 3-C, 4-D, 5-E, 6-F, 7-G, 8-H, 9-I.

Appendix C

DEFT. EXHIBIT B
MEMORANDUM

April 23, 1953
South San Francisco

Re: San Bruno Lands Incorporated

Today at a meeting of George Williams, Martin Wunderlich, Andrew Conway and Thomas Culligan, with Robert Crane also present, the parties discussed the purchase of San Bruno Lands Incorporated, a California Corporation and determined that they would make the purchase if the sale could be consummated with the present stockholders, and that the following plan would be carried out.

It is understood that the individuals present were representing various other interests, such as controlled corporations, trusts for their children, and etc., but that the only parties with whom each would have to deal would be George Williams, Frank Burrows, Andrew Conway, Thomas Culligan and Martin Wunderlich. That these individuals controlled the interests which they represented and were in a position to make all necessary decisions for these interests.

An agreement is to be prepared for the purchase of the stock, with Conway and Culligan contributing $116,666.00, Williams and Burrows $233,333.00 and Wunderlich contributing $350,000.00. The balance of the purchase shall be obtained by a loan of approximately $750,000.00 from the American Trust Com-

pany, with $250,000.00 being paid off upon the liquidation of San Bruno Lands and $500,000.00 by a loan in that amount from the San Francisco Bank secured by a Deed of Trust on all the property. The property shall be owned by the parties hereto as tenants-in-common with the interests of each in proportion to contribution. Mr. Gasser, the representative of the present stockholders of San Bruno Lands, shall be contacted immediately and an attempt made to work out the terms of purchase of all of the stock of that Company. Negotiations will attempt to have present condemnation proceedings, 15 acres for school and 40 or 50 acres for the Wherry Housing Act, consummated before title to the stock is transferred. If this cannot be done, the Corporation will be liquidated immediately on purchase of all the stock and the Wherry Housing Act condemnation stalled for six months. The parties are all flexible and will go along with whichever or whatever arrangement seems the most desirable or which can be worked out.

After the San Bruno Lands Company is liquidated, whether this be immediately upon acquisition or after a six months' holding period, with this question to be determined upon further consideration, parties shall for [sic] a development corporation with the stock holdings in that development corporation as follows:

Williams and Burrows	⅓ interest
Conway and Culligan	⅓ interest
Wunderlich	⅓ interest

This corporation will be so organized that it will be in a position to buy the real property from the indi-

vidual owners and allow the individual owners to take a capital gain. The development corporation, or a series of development corporations organized on the same basis, will purchase, either in one piece or in several parcels over a period of time, all of the real property which was formerly owned by San Bruno Lands Incorporated except the approximate 142 acres, commonly known as the "Navy Piece". The development corporation will pay for said land an average of $2000.00 per acre, which sum may vary with the individual parcels but which shall meet that average by the time all the property has been purchased. The Navy Parcel will be held by the individuals or their interests in the same proportion as their original contribution. The parties have all agreed that the above transactions be carried out in a manner which is most advantageous tax-wise.

The parties intend that the development company or companies will develop the real property by the construction of homes and the development of business areas. However, the parties further anticipate certain acreage will be sold to outside parties as soon as the capital gain can be realized so that the original loan to the San Francisco Bank can be retired as quickly as possible.

[N.B. The original of the above document consisted of two pages both of which carried initials of the parties thereto. See R. 82, 123.]

[illegible]